

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SIERRA CLUB, MINNESOTA)
CENTER FOR ENVIRONMENTAL)
ADVOCACY, INDIGENOUS)
ENVIRONMENTAL NETWORK, and)
NATIONAL WILDLIFE)
FEDERATION,)

Plaintiffs,)

v.)

HILLARY CLINTON, in her official capacity)
as Secretary of State, JAMES STEINBERG, in)
his official capacity as Deputy Secretary of)
State, UNITED STATES DEPARTMENT OF)
STATE,, Lieutenant General ROBERT L. VAN)
ANTWERP, in his official capacity as U.S.)
Army Chief of Engineers and Commanding)
General of the U.S. Army Corps of Engineers;)
Colonel JON L. CHRISTENSEN, in his official)
capacity as District Engineer and Commander of)
the U.S. Army Corps of Engineers; the)
UNITED STATES ARMY CORPS OF)
ENGINEERS, TOM TIDWELL, in his official)
capacity as Chief of the United States Forest)
Service; ROB HARPER, in his official capacity)
as Forest Supervisor for the Chippewa National)
Forest; and the UNITED STATES FOREST)
SERVICE,)

Defendants.)

and)

ENBRIDGE ENERGY, LIMITED)
PARTNERSHIP)

Intervenor-Defendant.)

Civ. No. 0:09-cv-02622-(DWF/RLE)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' AND DEFENDANT-
INTERVENOR'S MOTIONS TO
DISMISS**

(National Environmental Policy Act,
42 U.S.C. §§4321 *et seq.*)

Hon. Donovan W. Frank
U.S. District Judge

Hearing Date: December 11, 2009
Time: 11:00 am

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INTRODUCTION

Plaintiffs Sierra Club, Minnesota Center for Environmental Advocacy, Indigenous Environmental Network, and National Wildlife Federation (Plaintiffs) submit this Memorandum in opposition to the Motions to Dismiss filed by Defendants U.S. Department of State *et al.* (Defendants), and Defendant-Intervenor Enbridge Energy, L.P. (Enbridge). *See* Doc. No. 74, 90.

In their First Amended Complaint, Doc. No. 57 (Complaint), Plaintiffs challenge the issuance of three sets of permits: the State Department's issuance of a Presidential Permit for the construction and operation of the Alberta Clipper Pipeline and the connected Superior Terminal; the Army Corps's permits allowing Enbridge to dredge and fill wetlands and place structures in or under water-bodies in connection with construction of the Alberta Clipper and diluent pipelines; and the Forest Service's special use permits allowing Enbridge to construct and operate the Alberta Clipper and Southern Lights pipelines in the Chippewa National Forest. All three sets of permits were issued on the basis of a Final Environmental Impact Statement (FEIS) that failed to comply with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 *et seq.* Plaintiffs also challenge the State Department's constitutional authority to issue the Presidential Permit.

Defendants wrongly suggest that Plaintiffs' lawsuit invites this Court to enforce the terms of a 2004 executive order. Plaintiffs do not ask this Court to do any such thing. Instead, Plaintiffs ask this Court to decide whether the State Department has the constitutional authority to issue a Presidential Permit, and whether the State Department, the Army Corps of Engineers, and the Forest Service violated their separate obligations under NEPA to consider the Alberta Clipper and Southern Lights projects' reasonably foreseeable environmental impacts before issuing the permit. Defendants' and Enbridge's contention that this Court lacks jurisdiction and

that Plaintiffs have not adequately stated their claims is unsupported. This Court should reject Defendants' and Enbridge's bid to cast aside the important and settled justiciability principles on which Plaintiffs' claims rest and should decide this case on the merits.

BACKGROUND

I. PERMITTING PROCESS FOR TRANSBOUNDARY OIL PIPELINES.

The State Department approved the Alberta Clipper project pursuant to a 2004 executive order that empowers the Secretary of State to "receive all applications for Presidential permits...for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the...importation of petroleum [or] petroleum products...from a foreign country." Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (§1(a)) (Executive Order). The Executive Order succeeds a 1968 executive order that also delegated to the Secretary of State the authority to approve transboundary oil pipelines. *Id.* at 25,299; Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968). The 2004 Executive Order outlines essentially the same permitting process described in the 1968 order, but also applies to that process a policy to "expedite...review of permits or take other actions as necessary to accelerate the completion of [energy-related] projects, while maintaining safety, public health, and environmental protections." Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001) (§2); *see also* Exec. Order. No. 13,337, 69 Fed. Reg. at 25,299 (Preamble, referring to policies expressed in Executive Order 13,212).

When the Secretary of State receives an application for a Presidential Permit, she must "[r]efer the application and pertinent information to, and request the views of, the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, [and]

the Administrator of the Environmental Protection Agency.” Exec. Order No. 13,337, 69 Fed. Reg. at 25,299 (§1(b)(ii)). The Secretary also may, but is not required to, solicit input from “other Federal Government department and agency heads,” *id.* at 25,299 (§1(b)(iii)), as well as from state, tribal, and local officials and members of the public. *Id.* at 25,300-01 (§§1(e), (f), 3(a)). After this consultation process, “if the Secretary...finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary’s judgment require.” *Id.* at 25,300 (§1(g)). The Secretary also must notify the federal “officials required to be consulted [on the Permit application] of the proposed determination that a permit be issued.” *Id.*

The Executive Order states that the Secretary “shall issue...the permit in accordance with the proposed determination unless, within 15 days after notification” one of the notified officials informs the Secretary that he or she disagrees with that proposed determination “and requests the Secretary to refer the application to the President.” *Id.* at 25,300 (§1(i)). If she receives such a request, the Secretary “shall consult with any such requesting official” and, if she deems it “necessary,” shall “refer the application, together with statements of the views of any official involved, to the President for consideration and a final decision.” *Id.*

The Executive Order contains two statements concerning its legal effect. First,

[n]othing contained in this order shall be construed to affect the authority of any department or agency of the United States Government, or to supersede or replace the requirements established under any other provision of law, or to relieve a person from any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations subject to the jurisdiction of that department or agency.

Id. at 25,301 (§5) (emphasis added). Second, “[t]his order is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in

equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.” *Id.* at 25,301 (§6).

In issuing Presidential Permits, the State Department is bound not only by the terms of the Executive Order, but also by the procedural requirements of NEPA. NEPA and its general implementing regulations, promulgated by the Council on Environmental Quality (CEQ), prevent federal agencies from taking actions that may significantly affect the environment without first analyzing the environmental impacts of those actions. *See* 42 U.S.C. §4332(2)(C) (agencies to prepare a “detailed statement” for all actions “significantly affecting the human environment”); 40 C.F.R. §1508.11 (“‘Environmental impact statement’ means a detailed written statement as required by section 102(2)(C) of [NEPA]”); 40 C.F.R. §1508.9 (agencies to prepare a brief written assessment of an action’s impacts to determine “whether to prepare an environmental impact statement or a finding of no significant impact”). The State Department has issued regulations that incorporate and supplement the CEQ regulations for “decisions on all [State Department] actions which may affect the quality of the environment within the United States.” 22 C.F.R. §161.3; *see generally* 22 C.F.R. Part 161, Regulations for Implementation of the National Environmental Policy Act. These actions include grants “of permits for construction of international...pipeline[s]” “for which [DOS] has lead-agency responsibility.” 22 C.F.R. §161.7(c).¹

¹ The regulations distinguish these international permitting actions from those “required under any treaty or international agreement,” which the regulations indicate “will *not* be considered major federal actions requiring the preparation of an environmental impact statement,” 22 C.F.R. §161.7(d) (emphasis added), as well as from “actions having potential effects on...the environment of foreign nations,” which are governed by separate NEPA procedures. *Id.* §161.3 (citing procedures set forth in Executive Order No. 12,114, 44 Fed. Reg. 1,957 (Jan. 4, 1979)).

II. PERMITTING AND NEPA REVIEW OF THE ALBERTA CLIPPER AND SOUTHERN LIGHTS PIPELINES.

Because Enbridge's proposed expansion would involve construction on the U.S.-Canada border and the import and export of crude oil and refined petroleum products, Enbridge applied to the State Department for Presidential Permits for the import of heavy crude and construction of the Alberta Clipper pipeline, for the import of light sour crude and construction of the LSr pipeline, and for the export of diluent in Line 13. *See* Complaint at ¶29.

Enbridge also applied to the U.S. Army Corps of Engineers for permits to dredge and fill wetlands and place structures in or under water-bodies pursuant to section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act, *see* Army Corps ROD, Doc. No. 83-3; and to the U.S. Forest Service for a special use permit to site and construct the pipeline through the Chippewa National Forest. *See* Forest Service ROD, Doc. No. 108. Each agency decision on these permit requests is a major federal action triggering NEPA. 42 U.S.C. §4332(2)(C).

The State Department took the role of lead federal agency on the project for NEPA purposes and assumed responsibility for conducting the environmental review for the expansion project. FEIS, Doc. No. 97 at 1-8. While the other agencies cooperated with the Department of State, no other federal agency conducted an independent NEPA review. Each agency relied on the State Department's EIS to satisfy its NEPA obligations. *See* Forest Service ROD at 1-2; Army Corps ROD at 2. Instead of preparing one EIS for the entire expansion, as NEPA requires, *see* 40 C.F.R. § 1508.25(a), the State Department segregated the component parts of Enbridge's proposal and conducted its environmental review in separate pieces.

On July 27, 2007, the State Department issued Notices of Intent to prepare separate Environmental Assessments (EAs) for the LSr pipeline and the Alberta Clipper pipeline. Alberta Clipper Notice of Intent to Prepare an EA, 72 Fed. Reg. 41,381 (July 27, 2007); LSr Project

Notice of Intent to Prepare an EA, 72 Fed. Reg. 41,383 (July 27, 2007). The State Department did not issue a Notice of Intent to prepare an EA for the diluent pipeline and to date no environmental review has been conducted for that pipeline.

The State Department then determined it would proceed with an EA for the LSr pipeline but prepare an EIS for the Alberta Clipper pipeline. Plaintiffs, in comment letters sent to the State Department in December 2007, pointed out that all three pipelines were part of one project and that NEPA required the State Department to evaluate all three in one environmental impact statement. *See* MCEA Scoping Comments, Doc. No. 96 at 4-5. Over Plaintiffs' objections, the State Department proceeded with separate environmental reviews for the Alberta Clipper and LSr pipelines and did not review the diluent pipeline.

The State Department's EA for the LSr pipeline did not evaluate environmental impacts from the Alberta Clipper pipeline or the diluent pipeline. In its final EA and Finding of No Significant Impact (FONSI) for the LSr pipeline, the State Department represented that the diluent pipeline would be evaluated in the NEPA analysis for the Alberta Clipper project.

Southern Lights LSr FONSI, 73 Fed. Reg. 32,620 (June 9, 2008) ("The Alberta Clipper pipeline ... and the construction by Enbridge of another pipeline that would bring diluent north to the oil sands project, will be addressed in a separate Environmental Impact Statement that is being prepared for the Alberta Clipper project by the DOS working with other agencies.").

The State Department issued its FEIS for the Alberta Clipper project on June 8, 2009. However, the Department excluded both the LSr and diluent pipelines from its definition of the project under review, asserting that they were not connected actions for NEPA purposes.² FEIS

² The EIS claims that the 188-mile segment of the diluent pipeline that extends between Clearbrook, Minnesota and Superior, Wisconsin, is included in its cumulative impacts analysis. FEIS, Exh. 3 at 1-26. However, the environmental analysis in Chapter 4 of the final EIS does

at 1-17, 1-26.

On August 20, 2009, the State Department issued its Record of Decision (ROD) to issue a Presidential Permit for the Alberta Clipper pipeline, and issued the Alberta Clipper Presidential Permit. The permit allows the transport of tar sands crude oil from Canada into the United States across the U.S.-Canada border; authorizes the construction, connection, operation and maintenance of pipeline facilities at the border and sets terms regulating the entire length of the pipeline, according to the provisions of the FEIS and ROD. *See* Pres. Permit, Doc No. 83, Exh. 2 at Art. 13.

On August 24, 2009, the Army Corps issued Enbridge permits to dredge and fill wetlands and place structures in or under water-bodies in connection with construction of the Alberta Clipper and diluent pipelines. In a telephone conversation with Ralph Augustin, on August 25, 2009, Plaintiffs confirmed the issuance of the permit, and confirmed that the Army Corps did not conduct independent NEPA review but relied on its participation in the State Department's preparation of the Alberta Clipper EIS. Army Corps ROD at 2.

On June 29, 2009, the Chippewa National Forest Supervisor issued special use permits and a Record of Decision for the construction and maintenance of the Alberta Clipper and Southern Lights diluent pipelines in the Chippewa National Forest. Plaintiffs filed a timely administrative appeal on August 17, 2009, challenging the Forest Service's failure to conduct an independent NEPA analysis and its reliance on the State Department's inadequate FEIS. On September 24, 2009, the Appeal Reviewing Officer recommended that the appeal be denied and the ROD affirmed. On September 28, 2009, the Forest Service's Appeal Deciding Officer

not address the significant environmental impacts of the diluent pipeline. The LSr pipeline, the Line 13 reversal project, and the remaining 490 miles of new construction of the Southern Lights diluent project between Superior and Manhattan Illinois are completely omitted.

adopted the recommendation of the Reviewing Officer. The Appeal Deciding Officer's decision is the Forest Service's final agency action. 36 C.F.R. §215.18(c).

STANDARD OF REVIEW

Defendants move to dismiss Plaintiffs' constitutional claim against the State Department (claim six) and NEPA claims (claims one through five) against the Army Corps and Forest Service pursuant to Rule 12(b)(6) on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted.³ Defendants' Memorandum in Support of Motion to Dismiss (Def. Mem.), Doc. No. 74 at 1-2. When considering a motion to dismiss for failure to state a claim upon which relief can be granted the court must accept as true all factual allegations in the complaint and must construct the complaint liberally, drawing all reasonable inferences in the non-moving party's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Stufflebeam v. Harris*, 521 F.3d 884, 886 (8th Cir. 2008). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir.1982) (quotations omitted). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show...some insuperable bar to relief." *Id.* (quotations omitted); *see also Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985) (motion to dismiss for failure to state a claim "is generally viewed with disfavor and rarely granted").

For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plain statement of the claim and the grounds on which it rests. *See Fed. R. Civ. P. 8(a)(2)*;

³ Enbridge also moves to dismiss Plaintiffs NEPA claims against the State Department pursuant to Rule 12(b)(6) for failure to state a claim. Enbridge Memorandum In Support of Motion to Dismiss, Doc. No. 90 at 14.

Conley v. Gibson, 355 U.S. 41, 47 (1957). A motion to dismiss under Rule 12(b)(6) tests not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. *See* Fed. R. Civ. P. 12(b)(6); *Scheuer*, 416 U.S. at 236 (“The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”). The plaintiff need not plead the elements of a prima-facie case in the complaint. *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Defendants and Enbridge move to dismiss Plaintiffs’ NEPA claims (claims one through five) against the State Department for lack of jurisdiction pursuant to Rule 12(b)(1). Def. Mem. at 1; Enbridge Memorandum in Support of Motion to Dismiss (Enb. Mem.) Doc. No. 90 at 9. In reviewing a motion to dismiss for lack of subject matter jurisdiction, the court must accept as true all factual allegations in the complaint, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), and must “consider the factual allegations of the complaint in the light most favorable to the non-moving party.” *Smith v. U.S.*, 518 F. Supp. 2d 139, 145 (D.D.C. 2007). In ruling on a Rule 12(b)(1) motion, a court may consider materials outside the pleadings. *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

ARGUMENT

I. THE COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. Plaintiffs Have Standing.⁴

Defendants and Enbridge argue that Plaintiffs lack Article III standing to bring claims against the State Department in this case because “Plaintiffs cannot show that their alleged injuries are likely to be redressed by a favorable ruling of this Court on their NEPA claims.” Def. Mem. at 8; *see also* Enb. Mem. at 9.⁵ Defendants’ contention is both unsupported and wrong as a matter of law.

A plaintiff’s injury suffices for Article III standing if it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quotations omitted).⁶ It is well established, and Defendants acknowledge, that a plaintiff’s injury is “redressable” where she alleges a violation of a procedural right tied to a concrete interest, such as agency compliance with NEPA for a project that would affect her, even though compliance with the procedure would not necessarily alter the ultimate result of the process. *See Lujan*, 504 U.S. at 573 n.7 (NEPA as example of fact that a “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy”); *Lemon v.*

⁴ Plaintiffs Sierra Club, MCEA, and IEN filed standing declarations with Plaintiffs’ Motion for Preliminary Injunction. See Doc. Nos. 17-23. Standing Declarations for Plaintiff National Wildlife Federation are attached as Exhibits 1 and 2.

⁵ Neither Defendants nor Enbridge allege that Plaintiffs lack standing to bring claims against the Army Corps or the Forest Service.

⁶ Under Article III, the plaintiff’s injury (or, in the case of an organization, that of its members) also must be “concrete and particularized,” “actual or imminent,” and “fairly traceable to the challenged action of the defendant.” *Lujan*, 504 U.S. at 560 (quotations omitted); *see Friends of the Earth v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (an organization has standing if its members would have standing, the interests at stake are germane to the organization’s purpose, and the lawsuit does not require participation of individual members). Neither Defendants nor Enbridge contests that Plaintiffs satisfy these requirements.

Geran, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (standing has been upheld in “[c]ountless lawsuits” based on NEPA violations, correction of which may not ultimately change the outcome); Def. Mem at 8. Plaintiffs’ allegation that the State Department violated NEPA by issuing a Presidential Permit based on an FEIS that failed to fully consider all the reasonably foreseeable direct, indirect and cumulative impacts of the Project and failed to take a hard look at the Project’s stated purpose and need or to adequately consider a reasonable range of alternatives before granting the Presidential Permit, satisfies these standards for redressability. *See* Complaint at ¶¶77-111.

Defendants allege that this straightforward analysis does not apply here because the President, despite having delegated the task of issuing Presidential Permits to the State Department in successive Executive Orders spanning four decades, might scrap the procedures in those Orders and bypass any requirements this Court may impose on the State Department by issuing the Permit himself. *See* Def. Mem. at 9. This possibility, they argue, means that it is “entirely conjectural” that a favorable decision from this Court would redress Plaintiffs’ injuries. *Id.* Their argument does not withstand scrutiny.

First, as explained above, no Presidential action was required for the State Department’s grant of the Permit to be effective, nor did any occur. *See supra* pp. 2-3. Thus, the current situation is not one where “the redress of their alleged injury is dependent upon actions outside the control of the State Department.” Def. Mem at 9. Rather, it is the State Department’s action that has injured Plaintiffs, and an order declaring that the State Department violated NEPA, rescinding the Permit, and requiring NEPA compliance before it is reissued would bind the State Department and redress Plaintiffs’ injuries. Such an order would require the State Department to perform the proper NEPA analysis Plaintiffs seek in this case before it decides whether to reissue

the Permit, regardless of whether a later referral to the President is made under the procedures of the 2004 Executive Order.

Moreover, neither the State Department nor Enbridge explains why it is likely that the President will intervene in a manner that would defeat the redress that a favorable decision from this Court would provide. Indeed, the only evidence before the Court of Presidential intentions in this regard – the 2004 Executive Order delegating authority to the State Department over the permitting process and the previous Orders it reaffirms or incorporates – suggests the opposite. Because, as explained above, the 2004 Executive Order provides for Presidential involvement in the permitting process only when referral to him is requested by one of a select list of non-State Department officials (not including the President) and after the State Department confers with that official and deems referral necessary, *see supra* pp. 2-3, the spontaneous Presidential intervention Defendants hypothesize would violate the terms of the Order. It also would run counter to the desire to “provide a systematic method in connection with the issuance of [such] permits” upon which the delegation and its procedures have been predicated since 1968. Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968) (Preamble). Finally, such Presidential intervention would contradict the Order’s mandate not to “supersede or replace” other legal requirements and its policy to maintain environmental protections. *See supra* p. 3; Exec. Order No. 13,337, 69 Fed. Reg. at 25,299 (Preamble), 25,301 (§5); Exec Order No. 13,212, 66 Fed. Reg. at 28,357 (§2).

In another case concerning a Presidential Permit issued pursuant to the 2004 Executive Order for a similar cross-border pipeline, the District Court for the District of Columbia recently rejected precisely the same argument made by Defendants. *See Natural Res. Def. Council, Inc. v. U.S. Dept. of State (NRDC)*, 2009 WL 3153702 (D.D.C. Sept. 30, 2009). There, the court held

that “[t]he State Department’s argument goes too far,” reasoning that “[s]uch an argument would defeat standing in virtually any administrative case because agencies always act pursuant to delegated authority, whether from Congress or from the President, that can subsequently be withdrawn. That an agency’s delegated authority can be revoked is too speculative to defeat standing on redressability grounds.” *Id.* at *2, n.4.

One court examining the same issue has held to the contrary. *See Sisseton-Wahpeton Oyate v. U.S. Dep’t of State (Sisseton)*, 2009 WL 3153655 (D.S.D. Sept. 29, 2009), at *4 (Because “the President would still be free to issue the permit again under his inherent Constitutional authority⁷...it is purely speculative that a favorable ruling by this court would redress the injuries of which the plaintiffs complain.”). However, because the purpose of the Executive Order is to “provide a systematic method in connection with the issuance of [Presidential] permits,” 33 Fed. Reg. 11,741, it is considerably more speculative that the President might spontaneously abandon the directives in the Executive Order, than that the procedure set forth in the Executive Order will be followed.

Defendants seek further support in *Ashley v. U.S. Dep’t of Interior*, 408 F.3d 997 (8th Cir. 2005), and *Lujan*, 504 U.S. 555 (1992). *See* Def. Mem. at 9. Those cases are inapposite, however, because in each case the decision to complete or fund the controversial projects were made by a third party not bound by the decision of the Court. *See Ashley*, 408 F.3d at 1001 (government’s approval not necessary for Tribe’s use of trust payments so ruling against Department of Interior’s approval of the bond agreement would not alter the Tribe’s decision);

⁷ Unlike in the present case, the plaintiffs in *Sisseton* did not challenge the President’s constitutional authority to issue the Presidential Permit, and the issue was not briefed. Thus the South Dakota court’s conclusion that the President has “inherent constitutional authority” to issue Presidential Permits is *dicta*. As Plaintiffs demonstrate below, the State Department’s issuance of the Presidential Permit is unconstitutional and *ultra vires*. *See infra* at 33-48.

Lujan, 504 U.S. at 569-70 (Interior Department regulations that plaintiffs wanted revised not binding on the non-Interior agencies providing funding for the projects that injured the plaintiffs). In this case, by contrast, the future of the Alberta Clipper project depends entirely on the Presidential Permit, which was granted by the State Department and which this Court can order the State Department to rescind. In addition, unlike in *Ashley* and *Lujan*, where the Tribe and the non-Interior agencies made clear that their decisions to complete or fund the controversial projects did not turn on the Court's decisions, *see Ashley*, 408 F.3d at 1001; *Lujan*, 504 U.S. at 569-70, there is no indication here that the President will intervene and issue the Permit for the Alberta Clipper project despite an order from this Court requiring the State Department to comply with NEPA.

In sum, Defendants ask this Court to deny Plaintiffs standing and dismiss Plaintiffs' claims against the State Department based on speculation that the President himself might intervene in a future permitting process for the Alberta Clipper project to nullify any remedy this Court imposes on the State Department. As demonstrated above, Defendants offer no factual support for this speculation, let alone authority for their conclusion that such a possibility defeats Plaintiffs' standing to challenge completed agency action. In any event, on a motion to dismiss, it is the plaintiff's allegations, not the defendant's unsupported conjecture, that are assumed to be true. *See Lujan*, 504 U.S. at 561. Plaintiffs' injuries are likely to be redressed by a favorable decision in this case, and they have standing to sue.

B. The Court has jurisdiction pursuant to 28 U.S.C. §1331 and the APA over Plaintiffs' claims that the State Department violated NEPA.⁸

Plaintiffs' claims that the Department of State has violated a federal statute⁹ present questions of federal law that this Court has jurisdiction to review under 28 U.S.C. §1331. The APA waives the government's sovereign immunity and provides a private cause of action for challenges to final agency action that violates NEPA. *Cent. S. Dakota Coop. Grazing Dist. v. USDA*, 266 F.3d 889, 894 (8th Cir. 2001).

It is Congress's clearly expressed intent that all final orders, rules, licenses, or the equivalent thereof, issued by an "authority of the Government" be subject to judicial review. 5 U.S.C. §§551(13), 704; *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (APA "embodies the basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"). As the Supreme Court has made clear, "the cause of action for review of [final agency] action is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

⁸ Neither Defendants nor Enbridge moves to dismiss Plaintiffs' claims against the Corps or the Forest Service for lack of jurisdiction on the grounds that the actions of the Army Corps and the Forest Service are "presidential actions" and thus unreviewable under the APA. Nor do they claim that this Court lacks jurisdiction over Plaintiffs' constitutional claim. For the reasons set forth in Plaintiffs' Reply In Support of Motion for Prelim. Injunct., Doc. No. 130 at 1-3, incorporated herein by reference, this Court has jurisdiction over these claims.

⁹ Defendants attack Plaintiffs' claims against the State Department on the ground that "private parties may not enforce compliance with executive orders issued by the Executive Branch" and discuss at length the standards governing when an executive order is subject to judicial review. Def. Mem. at 12-15. However, Plaintiffs are not seeking to enforce the Executive Order, nor are they asking this Court to review the State Department's actions to determine whether it complied with the Order. Instead, Plaintiffs are seeking judicial review of the State Department's compliance with NEPA – a federal statute that gives the Court clear standards to apply. Thus Defendants' discussion of when an executive order is subject to judicial review is irrelevant.

1. The State Department's FEIS is a final agency action for purposes of APA review.

The State Department's issuance of a Final Environmental Impact Statement is a "final agency action" subject to judicial review under the APA. As the Eighth Circuit has held in *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808 (8th Cir. 2006), an agency's decision to issue a Finding of No Significant Impact (FONSI), "constitutes a final agency action under NEPA that is subject to immediate judicial review" under section 704 of the APA. *Id.* at 816. Citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), the court concluded that the Supreme Court has "strongly signaled that an agency's decision to issue either a FONSI or an environmental impact statement is a 'final agency action' permitting immediate judicial review under NEPA" 446 F.3d at 815. In *Ohio Forestry*, the Supreme Court held that "NEPA...simply guarantees a particular procedure, not a particular result.... Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737.

Defendants point to *Sierra Club* to argue that "the 'final agency action' necessary for APA review is not merely the preparation of a NEPA document" but instead requires a "decision to take a particular action." Def. Mem. at 11. However this interpretation ignores the Eighth Circuit's plain holding in that case: "we conclude that the Corps' decision to issue a FONSI constituted a 'final agency action' under NEPA that is subject to immediate judicial review under 5 U.S.C. §704." *Sierra Club*, 446 F.3d at 816. While the court does state that "plaintiffs in NEPA cases must point to 'action' at least arguably triggering the agency's obligation to prepare an impact statement," *id.*, the "action" to which the court is referring is a "major federal action" that triggers the agency's obligation to act in compliance with NEPA and is a necessary element of the NEPA claim.

In this case, the major federal action triggering the State Department's NEPA obligation is the Presidential Permit. The State Department itself recognizes that the Presidential Permit is a major federal action for purposes of NEPA. *See* Notice of Intent to Prepare EIS, 73 Fed. Reg. 16,920 (March 31, 2008) ("the issuance of the Presidential Permit to [Enbridge] for the Alberta Clipper Project would constitute a major federal action that may have a significant impact upon the environment within the meaning of the National Environmental Policy Act"). Thus the obligation to act is established, and the final NEPA action, the FEIS,¹⁰ is a final agency action reviewable under section 704 of the APA.

2. The State Department's issuance of the Presidential Permit is reviewable under the APA.

Because the State Department's issuance of the FEIS is a final agency action reviewable under the APA, *see supra* pp. 16-17, this Court need not reach the question whether the issuance of the Presidential Permit is an agency action. However, in the event that this Court finds that a separate, non-NEPA agency action is required for APA review, the State Department's issuance of the Presidential Permit is reviewable under the APA.

(a) Issuance of the Presidential Permit was final agency action for purposes of APA review, not "presidential action."

Defendants argue that the State Department's issuance of a Presidential Permit for the Alberta Clipper project is "presidential" action rather than "agency action," and therefore not subject to review. This position is contrary to the plain meaning of the APA, which makes "final agency action for which there is no other adequate remedy in a court" subject to judicial review. 5 U.S.C. §704. An action taken directly by an agency is presumptively reviewable if that action is the final step that subjects the parties to the "legal consequences" of the challenged action. *See Abbott*

¹⁰ There is no dispute that the State Department alone, not the President, exercised its authority to prepare and issue the FEIS.

Labs., 387 U.S. at 140; *Japan Whaling*, 478 U.S. at 231 n.4. If the President takes the final step, the courts acknowledge that the President’s action is not reviewable under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). But there is no support for the assertion that acting pursuant to the President’s request changes an agency’s action into something unreviewable.

The APA defines the term “agency” to include “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.”¹¹ 5 U.S.C. §551(1). There is no exemption for authorities of the U.S. Government acting pursuant to a presidential directive.

The State Department is an “agency” for APA purposes. *See Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (State Department failure to initiate consultation under Endangered Species Act is final agency action subject to judicial review under APA); *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1352-53 (D.C. Cir. 1997); 5 U.S.C. §701(b)(1). The fact that the agency is acting in a particular instance pursuant to an Executive Order does not change the action from an agency action to a Presidential action. *See Ryan v. Department of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980) (“[D]epending on its nature and functions, a particular unit is either an agency or it is not. Once a unit is found to be an agency, this determination will not vary according to its specific function in each individual case.”); *Pacific Legal Foundation v. CEQ*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (CEQ is an agency for Freedom of Information Act (FOIA) purposes even when directly advising the President); *David v.*

¹¹ Although the APA definition of “agency” does not explicitly exclude the President, the Supreme Court has held that “textual silence is not enough to subject the President to the provisions of the APA.” *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

Soucie, 448 F.2d 1067, 1072-76 (D.C. Cir. 1971) (Office of Science and Technology (OST) within Executive Office of President is “agency” under APA; the fact that OST report was produced at President’s request “does not deprive the report of its character” as an agency record for purposes of FOIA).

The D.C. Circuit has addressed the same question in determining the meaning of the term “agency” for purposes of FOIA.¹² In *Ryan v. Dep’t of Justice*, the D.C. Circuit held that the Department of Justice is an agency even when the Attorney General is compiling documents pursuant to an Executive Order that directed the Attorney General to provide specific advice to the President. 617 F.2d at 784. President Carter issued an Executive Order charging the Attorney General with the duty to evaluate and recommend potential judicial nominees to the President. *Id.* Plaintiffs sought disclosure of documents created in the execution of these duties pursuant to FOIA, but the district court held that the documents were not “agency records.” *Id.* On appeal, the

¹² The FOIA cases on what constitutes an “agency” are instructive in the present case, as the definition of “agency” for FOIA purposes is directly related to the definition under the APA. Congress passed FOIA in 1966 to strengthen the disclosure requirements of the APA. *Soucie*, 448 F.2d at 1072-73. In its original form, FOIA did not include a separate definition of “agency” but instead referred to the APA definition – “each authority of the Government of the United States, whether or not it is within or subject to review by another agency” and excluding certain enumerated entities including Congress and the Courts. 5 U.S.C. §551(1); *Soucie*, 448 F.2d at 1073. In *Soucie*, the D.C. Circuit held that the APA definition of agency includes entities within the Executive Office of the President (EOP), 448 F.2d at 1075 (“[T]he OST must be regarded as an agency subject to the APA and [FOIA].”). The only difference between FOIA’s current definition of “agency” and the APA definition is the result of Congress’s desire to ratify the holding in *Soucie* by specifying that the definition of agency includes entities within the EOP. Thus in 1974 Congress amended FOIA expressly to codify “the result reached in *Soucie v. David*.” *Pacific Legal Foundation*, 636 F.2d at 1263; *see also* H.R.Rep.No.93-1380, S.Rep.No.93-1200 (conference reports), 93d Cong., 2d Sess. 14 (1974). The 1974 Amendments to FOIA added section 552(f), which provides that “‘agency’ as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. §552(f). The differences in the definitions are irrelevant to the applicability of these FOIA cases in the present case because the State Department is not part of the EOP, thus its classification as an agency does not turn on this difference in the definition.

Government argued “that nomination of judges is a purely presidential function; that had the President himself [compiled the information it] would be exempt from FOIA; and that the President’s choice to draw the Attorney General into this presidential activity should not make the responses disclosable.” 617 F.2d at 788. The circuit court rejected this argument as “far too much.” *Id.* at 789. Not only would such an approach “cut back severely on the FOIA’s reach as interpreted by courts since its inception,” but “many cabinet officers ... act as advisors to the President for many of their important functions; yet they are not members of the presidential staff or exclusively presidential advisors, and thus are not exempt from FOIA.” *Id.* at 788-89. The court concluded that regardless of the presidential nature of the action, “*any unit or official that is part of an agency and has non-advisory functions cannot be considered a non-agency in selected contexts on a case-by-case basis.*” *Id.* at 789 (emphasis added). Likewise, the State Department’s issuance of the presidential permit in this case does not cease to be an agency action just because it was taken pursuant to an executive order or to assist the President with the exercise of his alleged presidential powers. As the *Ryan* court noted, “the President has a choice between using his staff to perform a function and using an agency to perform it.... These choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt. To redraw this statutory line in a different manner, based on complex functional considerations, would strain the language of the Act and present much greater complexity in litigation.” *Id.* at 789.

The court in *Ryan* reasoned that “[s]ince the creation of the Department of Justice in 1870 the Attorney General has always had two roles: advisor to the President and administrator of the Department of Justice. The same dual role would be true...of all other Cabinet officers,” 617 F.2d at 787, and noted that if it were to break out “all documents connected with these [advisory]

functions as not being ‘agency records’ under the FOIA, we would have a substantial percentage of Department of Justice records that were somehow transformed” into records that are not available to the public, which is not “either a realistic or intended distinction under the Freedom of Information Act.” *Id.* The Court in *Ryan* invoked the State Department to illustrate the point, noting that “a huge portion of the Secretary [of State]’s functions could be described as advising the President on the conduct of foreign relations ... but we could hardly say all the documents in the Department of State relating to the Secretary advising the President were not ‘agency records.’” *Id.* Similarly, if the courts were to exempt all agency actions taken at the behest of the President from review under the APA, a significant portion of agency actions would be unreviewable. Such a result would be contrary to the core purpose of the APA, which “embodies the basic presumption of judicial review.” *Abbott Labs. v. Gardner*, 387 U.S. at 140.

Rejection of a case-by-case functionality test in favor of a plain language interpretation of the meaning of “agency” is consistent with Supreme Court precedent holding that agency action is reviewable under the APA if the agency, as opposed to the President, takes the final step that subjects the parties to the “legal consequences” of the challenged action. *See Dalton v. Specter*, 511 U.S. 462, 469 (1994) (Secretary’s action in submitting a census report to the President was “not final and therefore not subject to review”); *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (agency’s presentation of a report not reviewable because it had “no direct consequences” and was “more like a tentative recommendation [to the President] than a final and binding determination”); *Japan Whaling*, 478 U.S. at 231 n.4 (Secretary of Commerce’s certification to the President that another country was endangering fisheries was final agency action and therefore reviewable under the APA).

The point at which an action is reviewable under the APA is when the action is “final” in the

sense that it (1) “mark[s] the consummation of the...decisionmaking process” and (2) is an action “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations omitted). In this case, consummation of the decisionmaking process and the point from which rights and obligations flowed was the State Department’s issuance of a Presidential Permit to Enbridge, which enabled Enbridge to begin construction. Executive Order 13,337 does not contemplate the President’s involvement in the permitting process except when one of the federal officials the State Department is required to consult raises an objection and requests that the State Department refer the permit to the President for consideration and approval. *See* Exec. Order No. 13,337, 69 Fed. Reg. at 25,300 (§1(i)). Even if the Secretary receives such a request, she must consult further with the objecting agency and only if she deems it “necessary” must she refer the final decision to the President. *Id.* Here, the State Department did not refer Enbridge’s Presidential Permit application to the President. Rather, the Permit simply took effect, *without further review*, after the State Department issued its “national interest” finding. Notice of Issuance of a Presidential Permit, 74 Fed. Reg. 43,212 (Aug. 26, 2009). Because the State Department, not the President, took the final action on Enbridge’s Permit, Defendants’ speculation that the President *could* have taken the final action on some other Permit is irrelevant.¹³ The final action is thus the State Department’s and, under the plain meaning of the APA, the State Department’s issuance of the Presidential Permit is reviewable.¹⁴

Defendants cite no Supreme Court or circuit court authority for the proposition that a final

¹³ The fact that the President could hypothetically rescind Executive Order 13,337 similarly cannot change this agency action into something else any more than the possibility that Congress could rescind a statute renders an agency action pursuant to such statute not final agency action.

¹⁴ At least one other court has exercised jurisdiction over challenges to the State Department’s issuance of a Presidential Permit. *See, e.g., Border Power Plant Working Group v. Dep’t of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (State Department issuance of a presidential permit for transborder electric lines violated NEPA).

action taken by an agency pursuant to an executive order is not a reviewable final agency action, but is instead a “Presidential action.” Defendants rely entirely on two recent district court decisions, *NRDC*, 2009 WL 3153702 (D.D.C. Sept. 30, 2009), and *Sisseton*, 2009 WL 3153655 (D.S.D. Sept. 29, 2009), both of which address the State Department’s issuance of a Presidential Permit for a similar cross-border pipeline.¹⁵ Def. Opp., Doc. No. 82 at 9-10. These two cases incorrectly hold that “an agency action pursuant to a delegation of the President’s inherent constitutional authority over foreign affairs is tantamount to an action by the President himself.” *NRDC*, 2009 WL 3153702 at *3; *Sisseton*, 2009 WL 3153655 at *6-8.

The district court in *NRDC* dismisses *Franklin* and *Dalton* as not directly on point because they address the finality of the action rather than the characterization of the action as agency or presidential action. However, those cases make clear that, had the agencies’ actions been final, the actions would have been reviewable under the APA. See *Dalton*, 511 U.S. at 469; *Franklin*, 505 U.S. at 798. It was only because the final actions in *Franklin* and *Dalton* were taken directly by the President that the Supreme Court held those actions to be presidential and therefore not subject to the APA. Where, as here, the final action is taken by the agency, the action is an agency action and the APA requires judicial review.

(b) The State Department’s compliance with NEPA is not committed to the agency’s discretion by law.

NRDC and *Sisseton* have created an exemption to APA review unsupported by the APA’s plain meaning by concluding that the State Department’s issuance of the Presidential Permit is unreviewable because it is based on the President’s delegation of his “unfettered discretion over the permitting process.” *NRDC*, 2009 WL 3153702 at *5; *Sisseton*, 2009 WL 3153655 at *7.

¹⁵ Enbridge cites a number of cases for the proposition that actions of the President are not reviewable under the APA. Enbridge Opp., Doc No. 78 at 11-12. That proposition is not remarkable, however, and those cases say nothing about whether agency action taken pursuant to an executive order is “presidential action.”

However, whether discretion over an action removes that action from review should be determined through the application of established interpretations of the APA provision exempting actions “committed to the agency’s discretion by law,” 5 U.S.C. §701(a)(2), rather than through a tortured interpretation of the definition of agency action.

As described above, the State Department’s issuance of the Presidential Permit is a final agency action falling within the purview of the APA. It is not one of the rare final agency actions “committed to agency discretion by law” that the APA exempts from judicial review. *Abbott Labs.*, 387 U.S. at 140-41 (The APA’s “generous review provisions must be given a hospitable interpretation.”). Under the APA, the only actions exempt from review as discretionary are those with respect to which the relevant “statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Here, Plaintiffs are challenging the State Department’s compliance with the terms of NEPA and its implementing regulations. Amend. Comp., ¶¶4, 77-111. NEPA requires all agencies of the federal government to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. §4332(2)(C). The State Department’s issuance of the Alberta Clipper permit is a “major federal action.” Notice of Intent to Prepare EIS, 73 Fed. Reg. 16,920 (March 31, 2008) (“the issuance of the Presidential Permit to [Enbridge] for the Alberta Clipper Project would constitute a major federal action that may have a significant impact upon the environment within the meaning of the National Environmental Policy Act”). The “standards” this Court must apply to determine compliance with this requirement are those set forth in NEPA, the CEQ regulations, and ample case law, all of which recognize that NEPA applies to State Department actions like the one Plaintiffs challenge here. Thus the State Department’s compliance with NEPA is not committed to the agency’s discretion by law.¹⁶

¹⁶ Defendants argue that the State Department has discretion over the permitting process pursuant to the Executive Order. However, Plaintiffs are not seeking to enforce or challenge the State Department’s compliance with the Executive Order. Rather, Plaintiffs challenge the State

II. PLAINTIFFS HAVE STATED CLAIMS THAT DEFENDANTS VIOLATED NEPA.

A. Plaintiffs have stated claims that the State Department's EIS Violates NEPA.

Defendants do not move to dismiss Plaintiffs' NEPA claims – the first through fifth claims for relief – against the State Department on the grounds that Plaintiffs have failed to state a claim upon which relief may be granted.¹⁷ Enbridge, however, moves to dismiss Plaintiffs' first through fourth¹⁸ claims for relief against the State Department and the Corps and Forest Service for failure to allege facts sufficient to demonstrate a violation of NEPA. Plaintiffs have provided more than “a short and plain statement of the claim and the grounds on which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47 (1957), thus they meet the pleading standard.

1. **Plaintiffs have stated a claim that the FEIS violated NEPA by failing to include all connected and cumulative actions.**

Plaintiffs' first claim for relief asserts that, pursuant to the CEQ regulations, the State Department is required to address in a single EIS all “connected,” “cumulative,” and “similar” actions. Complaint, ¶67 (citing 40 C.F.R. §1508.25(a)). The Complaint sets forth facts describing the Southern Lights and LSr pipelines and their relationship to the Alberta Clipper pipeline sufficient to support their claim that these three pipelines meet the definitions of “connected,” “cumulative” and “similar” actions. *Id.* at ¶¶2, 22-26, 78-80.

For example, Plaintiffs assert that the Alberta Clipper and diluent pipelines will be constructed simultaneously and in the same corridor and are thus similar actions pursuant to 40 C.F.R. §1508.25(a)(3). *Id.* at ¶78. Plaintiffs note that without an increased supply of diluent to

Department's compliance with NEPA, which provides sufficient standards for judicial review.

¹⁷ Defendants do assert that Plaintiffs' NEPA claims against the Corps and the Forest Service should be dismissed for failure to state a claim. Def. Mem. at 21-22. Plaintiffs address this assertion *infra* pp. 31-32.

¹⁸ Intevenor does not move to dismiss Plaintiffs' Fifth claim for relief on the grounds that Plaintiffs have failed to state a claim, but instead argues that this claim is moot. Enb. Mem. at 26-27. For the reasons set forth *infra* pp. 30-31, this mootness claim must fail.

facilitate transportation of viscous tar sands crude, the Alberta Clipper pipeline would not be able to transport the 450,000 bpd of crude for which it is designed. *Id.* Because the Alberta Clipper and diluent pipelines are interdependent parts of a larger action and when viewed together have cumulatively significant impacts, they meet the definition of connected and cumulative actions set forth in 40 C.F.R. §1508.25(a)(1) and (2). Plaintiffs also note that Enbridge refers to the LSr pipeline as the “capacity replacement project” because its primary purpose is to replace the transport capacity of Line 13, which will be reversed and diverted to transport diluent as part of the diluent pipeline, and assert that because the new LSr pipeline is an interdependent part of the larger expansion project and depends on the diluent pipeline and the Alberta Clipper Project for its justification it meets the definition of a connected action under 40 C.F.R. §1508.25(a)(1). *Id.* at ¶79. These facts form the basis of Plaintiffs’ first claim for relief: that the FEIS fails to evaluate the full range of actions, including similar, connected and cumulative actions. *Id.* at ¶80.

Enbridge moves to dismiss this first claim for relief “because the Alberta Clipper, Southern Lights and LSr pipelines are not connected actions.” *Enb. Mem.* at 15. However, this argument does not address whether Plaintiffs have stated a cognizable legal claim and sufficient facts to support that claim – Plaintiffs have clearly identified the relevant provisions of NEPA and the implementing regulations requiring assessment of similar, connected and cumulative actions, and have identified the factual grounds to support their argument that the FEIS omitted similar, connected and cumulative actions. Instead, Enbridge’s argument addresses the legal merits of the claim – whether the pipelines meet the legal definition of connected actions. This is not an appropriate grounds for dismissal pursuant to Rule 12(b)(6). *See Scheuer*, 416 U.S. at 236.

2. Plaintiffs have stated a claim that the FEIS violated NEPA by failing to adequately analyze indirect and cumulative impacts.

As stated in Plaintiffs' complaint, NEPA requires that an EIS include, among other things: (i) a "full and fair discussion" of the significance of all "direct," "indirect," and "cumulative" effects of the action, 40 C.F.R. §§1502.1, 1502.16(a)-(b), 1508.25(c); and (ii) a discussion of "means to mitigate adverse environmental impact," *id.* §1502.16(h). *See* Complaint at ¶68. Plaintiffs then identify specific indirect and cumulative impacts that were not adequately evaluated in the FEIS:

The final EIS for the Alberta Clipper pipeline does not account for: a) the upstream emissions generated by the increased tar sands development induced by increased U.S. transport and refining capacity; b) refinery upgrades and expansions necessary to accommodate the increased volumes and weight of crude oil delivered by the pipelines; c) the reasonably foreseeable future expansion of the Alberta Clipper pipeline capacity from 450,000 to 800,000 bpd; d) the downstream use of the oil; or e) the global warming impacts resulting from the connected diluent pipeline.

Id. at ¶85. The complaint also asserts that the FEIS fails to consider the cumulatively significant impacts of the Alberta Clipper pipeline when added to two similar new tar sands crude oil pipelines – the Keystone and Keystone XL pipelines – which will together transport approximately two million barrels per day of tar sands crude oil from Canada for refining in the United States. *Id.* at ¶¶27-28, 88. The Complaint describes these impacts at length. *Id.* at ¶¶45-60. In considering Enbridge's motion to dismiss, the Court must accept these factual allegations as true. *See Stufflebeam v. Harris*, 521 F.3d 884, 886 (8th Cir. 2008). These facts form the basis of Plaintiffs' second claim for relief.

Enbridge's motion to dismiss argues that Plaintiffs' second claim should be dismissed because the indirect and cumulative impacts Plaintiffs identify "were not within the scope of required NEPA review." *Enb. Mem.* at 19. However the scope of NEPA review is the very legal

question to be determined by this Court in consideration of the merits of this claim. Plaintiffs have stated a cognizable claim – that the scope of the FEIS is unlawfully narrow because it excludes indirect and cumulative impacts of the project – and have alleged sufficient facts to support that claim. Enbridge’s argument goes to the merits and is thus is not an appropriate grounds for dismissal pursuant to Rule 12(b)(6). *See Scheuer*, 416 U.S. at 236.

3. Plaintiffs have stated a claim that the FEIS violated NEPA by failing to adequately analyze the risks and impacts of pipeline leaks and spills.

Plaintiffs’ third claim for relief asserts that the State Department failed to adequately evaluate the risks and impacts of spills and operational pipeline leaks, and failed to consider measures to mitigate such risks, in violation NEPA’s requirement that agencies take a “hard look” at the impacts of their actions and that they consider means to mitigate adverse environmental impacts. Complaint at ¶94 (citing 42 U.S.C. §4332(2)(C); 40 C.F.R. §1508.7). The Complaint identifies the threats posed by leaks and spills, *id.* at ¶48, and describes how the FEIS: 1) approaches the issue of leaks and spills of crude oil by deferring the issue to a future review process to be undertaken by the Department of Transportation, *id.* at ¶¶37-38; and 2) fails to address the impacts of diluent spills at all because it does not identify the specific refined petroleum product that will be used as diluent and offers the public and public officials no understanding of the environmental consequences from leaks and spills of diluent along the Southern Lights diluent pipeline. *Id.* at ¶93. The Complaint concludes that this approach is insufficient to satisfy the requirements of NEPA. *Id.* at ¶94.

Enbridge argues that Plaintiffs have not adequately stated this claim because “the EIS fully assesses the impacts if a spill/leak were to occur, and discusses the safety and response plans that Enbridge is required to maintain by the federal pipeline safety agency, PHMSA.” *Enb. Mem.* at 22. Enbridge once again confuses the pleadings requirement with the merits of the

claim. Whether the impacts of leaks and spills of crude and diluent is “fully assessed” – *i.e.*, whether the assessment meets the requirements of NEPA – is the very legal question presented. Enbridge’s allegation that the Complaint “contains only a statement of facts that merely creates a suspicion that impacts of spills were not considered,” *id.* at 24, misses the heart of Plaintiffs’ claim that the treatment of leaks and spills in the FEIS was legally inadequate. Plaintiffs’ Complaint clearly sets forth this claim.

4. Plaintiffs have stated a claim that the FEIS fails to adequately consider the No Action alternative in violation of NEPA.

Plaintiffs’ fourth claim for relief asserts that the FEIS failed to take a hard look at the no action alternative and instead rejected it based on conclusory assertions that that alternative does not satisfy the project’s purpose and need. Complaint at ¶97. The Complaint establishes the NEPA requirements for evaluating alternatives to the proposed project: an EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” including the “alternative of no action,” and “devote substantial treatment to each alternative...so that reviewers may evaluate their comparative merits,” 40 C.F.R. §1502(1), and must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” *Id.* at 65-66 (citing 40 C.F.R. §§1502(1), 1502.13). An agency must not define its project purpose and need so narrowly as to preclude consideration of reasonable alternatives.” *Id.* at ¶66. The Complaint then asserts that the purpose for the project proposal as stated by Enbridge – meeting growing demand for petroleum products – is based on inaccurate assumptions about future demand for heavy tar sands crude. *Id.* at ¶98-99. Accepting these factual allegations as true, as the Court must, Plaintiffs have clearly stated a claim that “without an adequate assessment of the purpose and need for the project, the entire EIS is deficient – the State Department cannot take a ‘hard look’ at alternatives and balance costs and benefits of the

project as it considers the national interest unless it has first established that the need for the project as proposed is accurate.” *Id.* at 100.

Plaintiffs also claim that even if the perceived future energy shortfall in the United States were based on reliable forecasts, the construction of these new pipelines is not the only alternative for filling this perceived need. *Id.* at 101. Other alternatives include energy efficiency, renewable energy, clean technologies, and demand-side management or expansion of existing pipeline capacity should have been, but were not considered in the EIS. *Id.* at 101-02.

Enbridge argues that this claim for relief should be dismissed “on the ground that the State Department had no obligation to consider alternatives that did not meet the purpose and need” for the pipeline. Enb. Mem. at 24. This argument does not address Plaintiffs’ contention that the stated purpose and need is faulty. Moreover, although Enbridge asserts that Plaintiffs’ claims “fail as a matter of law,” *id.*, it goes on to attack the factual premise of the claim – whether there is an increase in “demand for heavy crude oil in the refinery market served by the...pipeline.” *Id.* Because the Court must accept Plaintiffs’ factual allegations as true, and because Plaintiffs have adequately asserted NEPA claims on the basis of those facts, Enbridge’s motion to dismiss Plaintiffs’ fourth claim for relief for failure to state a claim must fail.

B. Plaintiffs’ fifth claim that the Environmental Review for the LSr Pipeline should be supplemented to include the diluent pipeline is not moot.

Although Plaintiffs maintain that the State Department was legally obligated to consider the diluent pipeline as a connected and cumulative action in the Alberta Clipper EIS, *see supra*, pp. 25-26, Plaintiffs’ fifth claim for relief asserts that even if the Court disagrees, the State Department should provide a full evaluation of the Diluent pipeline in its EA for the LSr pipeline. *See* Complaint at ¶¶5, 105 - 11.

Defendants and Enbridge contend, incorrectly, that this claim is moot.¹⁹ Defendants appear to misread Plaintiffs' claim and requested relief. Plaintiffs request a declaration that the LSr EA is inadequate and seek an injunction against further construction and operation of the Southern Lights diluent pipeline, not an injunction against the already-completed LSr pipeline. *See* Complaint, Relief at ¶¶D, H. Unlike *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890 (8th Cir. 2004) cited by Defendants and Enbridge, Def. Mem. at 19; Enb. Mem. at 27, here there is an actual, on-going controversy over whether the environmental impacts of the diluent pipeline have been adequately examined, and "effective relief is available." 364 F.3d at 839.

As it stands, the federal Defendants have permitted, and Enbridge is currently constructing, a new international pipeline that will deliver an enormous amount of diluent daily to the Alberta tar fields, yet no federal agency has studied the full environmental impacts of this diluent project. Plaintiffs' claim seeks to enjoin further work on the Southern Lights diluent pipeline unless and until the federal agencies comply with NEPA. Because the Diluent pipeline is not yet completed and not operational, the claim is not moot. *See Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir.1998) (challenge to EA concerning one part of five-part project was not moot where Forest Service erred in segmenting project and not analyzing it under NEPA as a whole).

C. Plaintiffs have adequately stated NEPA claims against the Army Corps and Forest Service.

Defendants incorrectly argue that Plaintiffs NEPA claims against the Corps and Forest Service "should be dismissed because they fail to set forth with any particularity the actions of

¹⁹ In NEPA cases, defendants have "a particularly heavy burden in establishing mootness" to discourage project proponents from ignoring NEPA, building their structures, and then "hiding behind the mootness doctrine." *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (citation omitted).

these agencies that resulted in violations of NEPA.” Def. Mem. at 21. “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the...claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)). Plaintiffs meet this standard.

Plaintiffs alleged NEPA claims against both agencies. The Complaint: a) identifies both the Corps’s and Forest Service’s actions triggering the obligation to comply with NEPA, Complaint at ¶¶30, 43-44; b) states that both agencies were required to perform a NEPA analysis, *id.* at ¶¶43-44, 80-81 (“The ACE and Forest Service’s granting of permits for construction and operation of the Southern Lights Diluent pipeline in reliance on the State Department’s inadequate assessment and without conducting an independent environmental review of the diluent pipeline violates NEPA, 42 U.S.C. §4332(2)(C).”); and c) asserts for each of the stated NEPA claims that because neither agency completed an independent EIS but instead relied on the State Department’s deficient FEIS, the agencies’ permits were issued in violation of NEPA. *Id.* at ¶¶85, 90, 93, 96, 104. Plaintiffs’ NEPA claims against the Corps and Forest Service meet the basic pleading requirement set forth in the Federal Rules, *see* Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and Defendants’ motion to dismiss on these ground should be denied.

III. PLAINTIFFS HAVE STATED A CONSTITUTIONAL CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. The Amended Complaint States a Claim upon which Relief can be Granted.

Federal Defendants contend that Plaintiffs’ Sixth Claim for Relief should be dismissed under Fed. R. Civ. P. 12(b)(6) for “failure to state a claim upon which relief can be granted.” As noted above, in reviewing a Rule 12(b)(6) motion, the court must accept all allegations as true

and should not dismiss “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Fusco*, 676 F.2d at 334 (quotations omitted). Such a dismissal “is likely to be granted only in the unusual case in which a plaintiff includes allegations that show...some insuperable bar to relief.” *Id.* (quotations omitted).

No such bar to relief exists in this case. As set forth in the Complaint, the State Department has no statutory authority to issue the permit for the Alberta Clipper pipeline. Complaint at ¶¶74-75, 113-114. The State Department lacks constitutional authority to issue the permit because the pipeline is foreign commerce, and Congress, not the Executive Branch, has exclusive and plenary authority over foreign commerce under Article I, section 8, clause 3 of the U.S. Constitution. Complaint at ¶¶6, 73-75, 112-115. Congress has not delegated that power to the Executive Branch. *Id.* Therefore, the State Department’s action was “contrary to constitutional right, power, privilege,” 5 U.S.C. §706(2), and Plaintiffs have requested a declaratory judgment that the State Department’s action was unconstitutional and an injunction pursuant to 28 U.S.C. §2201-02. Complaint at ¶¶6, 112-115. Thus, the Complaint contains far more than mere “conclusory allegations,” Enb. Mem. at 29, and this Court should deny the Rule 12(b)(6) motions.

B. The State Department’s Issuance of the Alberta Clipper Presidential Permit is Unconstitutional.

Because the motions to dismiss argue the merits of Plaintiffs’ constitutional claims, Plaintiffs respond in detail as follows.

Defendants assert that the Presidential Permit is intended only to permit “a border crossing facility,” Def. Mem at 2, 20, and that the State Department has the authority to regulate such facilities and activities in the exercise of the President’s foreign affairs and commander-in-chief powers. However, the Presidential Permit does not only regulate activities or facilities at

the border, but instead regulates – in substantial detail – pipeline activities as far as 327 miles into the United States. Moreover, even at the border, a tar sands oil pipeline such as the one at issue in this case is a matter of foreign commerce, the regulation of which is within the exclusive constitutional authority of Congress. Because the President has no independent authority to regulate foreign commercial activities like a tar sands oil pipeline, and because Congress has not explicitly or implicitly approved the President’s regulation of such pipelines, the President does not have any authority to issue this permit.

1. Congress, not the President, has Authority to Regulate Tar Sands Oil Pipelines.

(a) Tar sands oil pipelines are foreign commerce.

The Foreign Commerce Clause has been so broadly interpreted by the courts that there is no doubt that the Alberta Clipper pipeline falls under its purview. *See Gibbons v. Ogden*, 22 U.S. 1, 193 (1824) (“it has...been universally admitted that [the words of the Commerce Clause] comprehend every species of commercial intercourse between the United States and foreign nations.”); *U.S. v. Wilson*, 160 F.2d 745 (7th Cir. 1947) (“Commerce with foreign nations” means trade in all its branches, including the transportation of property.).

Courts have specifically recognized that oil pipelines are matters of commerce. The Supreme Court held that the transportation of oil by interstate pipelines is interstate commerce even where the oil was completely owned by the pipeline owners. *U.S. v. Ohio Oil Co.*, 234 U.S. 548, 560–61 (1914). And in *State v. Brown*, the court held that a law regulating oil in the Trans-Alaska Pipeline System “operate[d] well within the sphere of *the foreign commerce power*” despite the fact that the pipeline did not cross a border. 850 F. Supp. 821, 827 (D. Alaska 1994) (emphasis added). An oil pipeline that physically crosses an international border is an even clearer example of foreign commerce.

(b) Congress has exclusive authority over foreign commerce, including tar sands oil pipelines.

The Alberta Clipper Presidential Permit is unlawful because Congress's permitting authority over international oil pipelines is exclusive. Congress, not the President or any Executive department, has the express and exclusive constitutional authority to "regulate commerce with foreign nations." U.S. Const. art. I, §8, cl. 3.

Courts have continuously recognized the exclusive nature of Congress's broad power over foreign commerce. For example, in *U.S. v. Clark*, 435 F.3d 1100, 1114–17 (9th Cir. 2006), the court upheld a federal statute criminalizing acts by U.S. citizens while abroad, and emphasized the fundamental principle that the power to regulate foreign commerce lies *exclusively* with Congress. It noted that "[t]he [Supreme] Court has been unwavering in reading Congress' power over foreign commerce broadly." *Id.* at 1113; *see also Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974) (Congress's plenary authority over foreign commerce "is not open to dispute"); *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904) (describing the "complete power of Congress over foreign commerce"); *U.S. v. Bredimus*, 352 F.3d 200, 208 (5th Cir. 2003) ("Congress's authority to regulate foreign commerce is even broader than its authority to regulate interstate commerce.").

The Constitution grants the President no authority over foreign commerce. Where the President has no constitutional authority, he can act only with Congressional authorization. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975) (President may not act as lawmaker absent delegation of authority or mandate from Congress).

In the seminal *Youngstown* case, the Supreme Court held that the Secretary of Commerce's wartime seizure of domestic steel mills pursuant to an Executive Order exceeded

the President's constitutional power. 343 U.S. 579. The Court held the seizure unconstitutional because, as in the instant case, there was no express constitutional language granting the power to the President, nor was there a statute authorizing it. *Id.* at 585–87.

The need for Congressional delegation is particularly important if the President attempts to act in an area constitutionally delegated to Congress. *See id.* (Jackson, J., concurring) (In the absence of Congressional authorization, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*" (emphasis added)). Absent a delegation of power from Congress, therefore, the President cannot regulate a commercial activity like a tar sands oil pipeline. *See, e.g., U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953) (invalidating executive agreement with Canada regarding importation of potato seeds because "the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is exclusively vested by the Constitution in Congress"; "Imports from a foreign county are foreign commerce subject to regulation, so far as this county is concerned, by Congress alone."); *Target Sportswear Inc. v. U.S.*, 875 F. Supp. 835, 838 n.2 (Ct. Int'l Trade 1995) ("Fundamentally, under the U.S. Constitution the authority to regulate foreign commerce and trade with other nations lies exclusively with the Congress."); *U.S. v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572 (C.C.C.P.A. 1975) ("It is nonetheless clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.").

Youngstown marked a paradigm shift in the understanding of the power of the President. It demonstrated that the judicial branch provides a constitutional check on the President's foreign affairs and commander-in-chief powers, and the mere fact that the President directed the agency action under an Executive Order invoking those powers does not make the action constitutional

or shield it from judicial review. Justice Jackson's concurrence in *Youngstown* strongly warned against the President's foreign affairs power being used over the internal affairs of the country. *Id.* at 642 (“[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country” through the use of his commander-in-chief powers.). The instant case presents an analogous situation: under the color of its foreign affairs powers, the Executive branch is permitting and regulating a border crossing and 327 miles of internal pipeline across three states, and assuming the authority to prepare the Environmental Impact Statement for the entire pipeline and related facilities, while simultaneously claiming that no judicial review of this action is possible because NEPA and the APA do not apply to the President.

Similarly, the President cannot regulate an oil pipeline without the consent of Congress, even if the pipeline crosses the border with Canada. The fact that the pipeline crosses an international border does not give the President authority to regulate this quintessentially commercial activity. Although some courts have interpreted the President's implied “foreign affairs” power²⁰ broadly in the context of diplomacy and foreign relations, this power has never justified regulatory or permitting authority with respect to matters outside his authority without Congressional authorization. Thus, in *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5 (1936), the Court held that the President did not have the authority to extradite a U.S. citizen in

²⁰ The Constitution grants the President Commander-in-Chief powers, foreign affairs powers to make treaties and appoint ambassadors with the advice and consent of the Senate, the power to receive ambassadors and other public ministers, and the power to see that the laws are faithfully executed. U.S. Const. art. II. Courts have held that these powers include the authority to recognize foreign countries, *U.S. v. Pink*, 315 U.S. 203 (1942), and the power to enter into executive agreements with other countries. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003).

the absence of a statute or treaty, despite the foreign relations implications of extradition. Similarly, in *Kent v. Dulles*, 357 U.S. 116 (1958), the Court held that the Department of State could not withhold a citizen's passport without Congressional authorization. *See also*, Louis Henkin, *Foreign Affairs and the U.S. Constitution*, 89-90 (1996) (President cannot spend, authorize war, or legislate – all powers within the exclusive authority of Congress – even if foreign affairs are implicated; President could not draw funds from the treasury even to build a foreign embassy). All channels of foreign commerce, by definition, implicate issues of foreign affairs to some degree, and to allow the President's foreign affairs power to encompass all foreign commerce on this basis would undermine the constitutional exclusivity of Congress's authority over foreign commerce. Without a delegation of power, Congress has not “abdicat[ed] its constitutional power to regulate foreign commerce. It remains the ultimate decision maker and the fundamental reservoir of power to regulate commerce.” *Yoshida Int'l.*, 526 F.2d at 582.

(c) *The historical sources that Defendants cite support Plaintiffs' their claim of Presidential authority.*

Federal Defendants contend that “it is well established that the President has the constitutional authority to issue such permits” and that “Presidents have exercised such authority for over a century.” Def. Mem. at 7. As authority they cite only two articles from 1906 and 1942 concerning the permitting of trans-boundary telegraph cables and six repetitious Attorney General opinions from the late 19th and early 20th centuries. *Id.* at 20. Not only do all of these authorities predate *Youngstown* and the other cases described above in which the Supreme Court and other courts have settled the question of the President's authority to act with respect to matters of foreign commerce, the history of telegraph cable regulation supports Plaintiffs' constitutional claim.

The first cross-border telegraph cable was laid in 1867 pursuant to a *congressional grant*

of authority. John Bassett Moore, A Digest of International Law, Vol. II, §227, pp. 452, 453 (1906). In 1869, President Grant did not prevent the landing of a French cable on U.S. shores, but he also presented the subject to Congress for action. A. Hackworth, Digest of International Law, Vol. IV, §350, p. 250 (1942). President Cleveland subsequently stated the Executive's position: "[I]n the absence of such legislation, executive action of the character desired would have no binding force." Moore, *supra* at 460. In 1895, the State Department affirmed this, stating that since there was no federal statute, "[t]he Department has, therefore, no power to act in the matter." *Id.* at 461 (emphasis added).

In 1896, the Attorney General asserted that it had the authority to prevent an international cable from landing, and sought an injunction stopping the laying of the cables. *U.S. v. La Compagnie Francaise Des Cables Telegraphiques*, 77 F. 495 (S.D.N.Y. 1896). Because the court denied the injunction on the ground that the cable had already landed and there was no irreparable harm, *id.*, its statement that in the absence of congressional action it would seem to fall to the executive to decide whether to allow transboundary cables is mere *dicta*. However, the court's opinion supports Plaintiffs because it recognizes that "*it is certainly indisputable that congress has absolute authority over the subject*" and found that because Congress was in session, Congress could take immediate action to resolve the matter. *Id.* After that, the State Department continued to assert it lacked authority over cable permits. Moore, *supra* at 452.

The Attorney General again tried unsuccessfully to stop an international cable in *U.S. v. Western Union Telegraph Co.*, 272 F. 311, 317 (D.N.Y. 1921). The court held that the President is without constitutional power, in the absence of authority from the legislative branch, to prohibit the landing of a cable from a foreign country because Congress has that power "by virtue of its authority to regulate foreign commerce." 272 F. at 313. The court denied the

injunction on the ground that Congress had allowed the cables under the Post Roads Act and had long known about the cables. *Id.* at 323. Thus, “the so-called executive power to restrict unauthorized foreign cable connections did not apply to this case.” *Id.*

The issue was addressed on appeal in *U.S. v. Western Union Telegraph Co.*, 272 Fed. 893 (2d Cir. 1921) (per curiam). The court affirmed the denial of the injunction, stating: “[T]he right to permit or to prohibit the landing of cables between foreign countries and the American coast is in Congress, under its power to regulate commerce between the states and between the states and foreign countries.... We think no practice has been established sufficient to sustain the contention that the President has such power as Chief Executive....” *Id.* at 894.²¹

Eventually Congress delegated its authority to the Executive to issue permits for the landing cables on U.S. shores by passing the Kellogg Act in 1921, 47 U.S.C.A. 34 *et seq.* But as the above analysis shows, the history of telegraph cables does not establish the President has authority to permit a border crossing in the absence of congressional action. To the contrary, it demonstrates that is a matter for Congress.

The Attorney General opinions cited by Federal Defendants also provide no support for their claims. First, such opinions are neither conclusive nor binding on a court. *Crandon v. U.S.*, 494 U.S. 152, 177 (1990) (attorney general opinions are not administrative opinions that are entitled to deference); *Alderfer v. Board of Trustees of The Edwards County Hosp. and Healthcare Center*, 261 Fed. Appx. 147 (10th Cir. 2008); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 338 (6th Cir. 2007) (“an Attorney General’s Opinion has no precedential value”). Moreover, these opinions all predate *Youngstown* and other relevant cases.

²¹ In the Supreme Court, the case was “reversed by stipulation of the parties” without explanation although likely resulting from the intervening Kellogg Act. *See U.S. v. Western Union Telegraph Co.*, 260 U.S. 754 (1922).

Second, the Attorney General opinions Defendants cite are inapposite. The first opinion Defendants rely on regarded submarine cables in 1898. 22 U.S. Op. Atty. Gen. 13, 1898 WL 427. Although it opined that the President could regulate foreign cables, it was inconsistent with the history of telegraph cables described above. In *Western Union*, the court discussed the 1898 Attorney General opinion and disagreed with it. See 272 F. at 317-18, 323 (the court “differed with the views of the government as to executive power”). The Federal Defendants’ reliance on three subsequent attorney general opinions on telegraph cables adds nothing, since they were based on the 1898 opinion.²²

The other two Attorney General opinions Defendants rely on are also inapposite. One, involving a diversion of the Niagara River in 1913, opined that the President could prevent the diversion under a treaty. 30 U.S. Op. Atty. Gen. 217, 218-19; 1913 WL 685. The 1935 opinion concerns a gas pipeline, and cites no authority other than the 1898 Attorney General Opinion. 38 U.S. Op. Atty. Gen. 163, 1935 WL 1371. In addition, because both of those opinions pre-date *Western Union* and *Youngstown*, they are of no weight in this case.

The attorney general opinions are also distinguishable from the present situation since the 1898 opinion was based on the President’s authority as commander of the army – the Attorney General reasoned that the cables were of tremendous use to the President in communicating with his officers and diplomats. Moore, *supra* at 462. The 1899 Attorney General Opinion similarly found the matter was of “a military nature,” and the Niagara River opinion suggested that the President had a duty as commander-in-chief to stop Canada from appropriating the river.

Defendants suggest no military rationale for regulating the Alberta Clipper pipeline.

²² Enbridge wildly misquotes the 1899 Attorney General Opinion by interpolating into it the phrase “[issuance of Presidential Permits for oil pipelines]”. Enbridge Mem. at 28. The 1899 opinion had nothing to do with, and never once mentioned, oil pipelines. It involved a submarine communication cable. 22 U.S. Atty. Gen Op. 514, 515; 1899 WL 562 **1.

(d) Congress has not delegated to the Executive the authority to regulate tar sands oil pipelines or acquiesced in that practice.

Defendants have made no claim that Congress has explicitly delegated to the President any authority to regulate tar sands oil pipelines. In fact, the State Department admits that it has no statutory authority to issue the Alberta Clipper permit or regulate the pipeline. *See* Def. Opp. to Pl. Mot. for TRO, Doc. No. 15 at 10 (“[T]here is no statutory basis underlying the Under Secretary of State’s issuance of the permit.”); Def. Opp. to Mot. for Prelim. Injunc., Doc. No. 82 at 10 (“no such laws are implicated in this case”).

Congress has also done nothing to suggest any implicit delegation of such authority, or any acquiescence in Presidential regulation of such pipelines. To the contrary, Congress’s action indicates an intention to retain its authority over oil pipelines.

Congress has delegated limited powers to regulate certain aspects of international oil pipelines to specific Executive agencies, but there is no delegation to the State Department. For instance, in the Hepburn Act of 1906, Congress expanded the Interstate Commerce Act of 1877 to apply to international oil pipelines, and authorized the Interstate Commerce Commission (ICC) to set rates that pipeline operators can charge for the transport of oil by pipelines. Pub. L. No. 59-3337, §1, 34 Stat. 584 (as amended). Congress transferred the ICC’s jurisdiction to the Federal Energy Regulatory Commission (FERC) in the Department of Energy Organization Act, 42 U.S.C. §§7111 *et seq.* (1977), and amended FERC’s authority in the Energy Policy Act of 1992, 49 U.S.C. §§112 *et seq.* In the Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. No. 96-129, and in an amendment in the Pipeline Safety Act of 1992, Pub. L. No. 102-508, Congress delegated limited authority to the Department of Transportation to regulate pipeline safety. In the 2006 Pipeline Inspection, Protection, Enforcement, and Safety Act, 49 U.S.C. §§60,134 *et seq.*, Congress addressed the authority of the Pipeline and Hazardous Materials Safety

Administration. In these statutes or others, Congress could have authorized the State Department to issue permits allowing transport of crude oil between the United States and Canada and for pipeline construction, connection and operation, but it did not.

Congress's retention of authority over international pipelines is also evident from its practice of authorizing specific pipeline systems. In 1973, Congress authorized construction of the Trans-Alaska Pipeline System (TAPS). 43 U.S.C. §§1651 *et seq.* (1973). The TAPS was a matter of "foreign commerce" for Congress despite the fact that it crossed no international borders. *State v. Brown*, 850 F. Supp. at 827-28. In the Public Utility Regulatory Policies Act, 43 U.S.C. §§2001 *et seq.*, Congress delegated to the President the authority to choose the preferred route of an east-west pipeline and to give it preferential treatment in the permitting process. These statutes demonstrate that Congress reserved ultimate authority over oil pipelines and required the passage of specific legislation, with specific grants of authority to the Executive Branch, before specific pipelines could be built. There is, however, no such grant of authority for the Alberta Clipper pipeline.

In addition, Congress's reservation of authority over pipelines crossing the Canadian border is evident in its grants of authority for other border crossings. For example, Congress delegated to the Executive authority over transboundary natural gas pipelines in the Natural Gas Act, 15 U.S.C. §§17 *et seq.* (1938); transboundary bridges in the International Bridge Act, 33 U.S.C. §535(b) (1972); and international telegraph cables in the Kellogg Act, 47 U.S.C. §§34 *et seq.* (1921). By contrast, there is no congressional act authorizing border crossings for tar sands crude oil pipelines.

In any of these statutes, Congress could have authorized the State Department to issue permits for international oil pipelines, but it did not. There is thus no grant of authority for

international tar sands crude pipelines generally or the Alberta Clipper pipeline in particular. *See, e.g., U.S. v. Juan-Manuel*, 222 F.3d 480, 487–88 (8th Cir. 2000) (because Congress expressly granted sentencing courts the authority to suspend a defendant’s period of supervised release in at least two statutes, its exclusion from another sentencing statute evinced congressional intent to withhold that authority). All of these statutes demonstrate that Congress reserved the ultimate authority over oil pipelines and thus must either permit a pipeline by a legislative act or must explicitly grant authority to the Executive branch to do so.

(e) The NRDC and Sisseton cases did not address the constitutional claims in this case and were conclusory and erroneous.

Federal Defendants try to bootstrap their argument by citing *NRDC*, 2009 WL 3153702 *3, which found that Defendants had demonstrated a long history of Presidents exercising inherent foreign affairs power to issue cross-border permits. Def. Mem. at 20. However, Federal Defendants only support for that history in *NRDC* was the same string of citations that they presented in this case. *See* Exh. 3 attached. Plaintiffs in *NRDC* did not contest that assertion, raise any of the points Plaintiffs have made above, or present any constitutional challenge to the Executive’s authority. *See NRDC* at *6 n.7 (“Actions of the President and his agents are still subject to non-statutory judicial review to determine the constitutionality of those action or to determine whether those actions are *ultra vires*, In this case, however, [plaintiff claims that] the State Department...abused its discretion by issuing a presidential permit based on a deficient EIS.”).

The Intervenor’s reliance on *Sisseton* is similarly misplaced. *See* Enb. Mem. at 28. Plaintiffs in *Sisseton* did not raise the constitutional claims or contest the Executive’s power to issue the permit. *Sisseton* relies on *dicta* from a pre-*Youngstown* case – *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936) – as the basis for application of the President’s

inherent foreign affairs power. *Sisseton*, 2009 WL 3153655 at * 7. That was erroneous because Justice Jackson dismissed that *dicta* in *Youngstown*, and pointed out that *Curtiss-Wright* “involved not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an act of Congress.” 343 U.S. at 635-36 n.2. *Curtiss-Wright* merely held that the congressional delegation to the President was constitutional. *See* 299 U.S. at 327-28.

Sisseton further erred in assuming that Congress “has failed to create federal regulatory scheme for the construction of oil pipelines.” *Sisseton* at * 7. Pursuant to numerous statutes, pipelines are subject to permitting by DOT, FERC, PHMSA, the Army Corps of Engineers, the Forest Service, and EPA. *See supra* pp. 42-43. In *Spiller v. Walker*, 2002 WL 1609722 (W.D. Tex. 2002), the court found Federal Defendants’ argument that building an oil pipeline was a non-federal private action was “not only arbitrary and capricious but ridiculous.” *Id.* at *2. The court ordered “DOT and/or EPA” to prepare a NEPA analysis for the pipeline and enjoined the operator from placing petroleum products into the pipeline until the Court ordered otherwise. *Id.* Even if Congress had “failed to act,” that does not establish that the Executive has the constitutional right to act. *Western Union*, 272 F. at 313 (President is without constitutional power, in the absence of authority from the legislative branch, to prohibit the landing of a cable from a foreign country because Congress has that power “by virtue of its authority to regulate foreign commerce.”). The instant case is analogous to *Wilderness Soc. v. Morton*, 479 F.2d 842 (D.C. Cir. 1973), which held that Congress did not acquiesce to the Secretary of the Interior’s authorization of the construction of oil pipelines because there was no indication the practice had been brought to the attention of Congress or was of such general knowledge that it was reasonable to assume that Members of Congress knew of the practice. The Alberta Clipper

pipeline is only the second international tar sands crude pipeline for which a Presidential Permit has been issued. The first was the Keystone pipeline, which was at issue in *NRDC and Sisseton*, the Presidential Permit for which was issued in March, 2008. After only two permits in less than 18 months, there is no basis for concluding that Congress is aware of the State Department's practice of issuing permits for these pipelines or that it has acquiesced in the practice. Even if Congress was silent, that does not constitute ratification. See *U.S. v. Chemical Foundation*, 5 F.2d 191 (3d Cir. 1925). Contrary to the State Department's arguments, an unconstitutional act does not become constitutional simply because it has been repeated over a long period of time.

2. The Alberta Clipper Presidential Permit is *Ultra Vires* and Void.

(a) Even if the President's foreign affairs powers authorized him to regulate border crossings, the Alberta Clipper Permit far exceeds this authority.

Even if the President's foreign affairs powers gave him the constitutional authority to issue a cross-border permit for tar sands oil pipelines, which Plaintiffs dispute, that authority was exceeded in this case because the Alberta Clipper permit is not limited to allowing a border crossing. Rather the plain language of the permit regulates 327 miles of pipeline and related facilities in three states. Plaintiffs' Amended Complaint, ¶¶73-74, asserts that such regulation is an unconstitutional infringement on Congress's exclusive and plenary commerce authority. See U.S. Const. art. I, §8, cl. 3.

The State Department admits that "*neither the President nor the State Department has claimed any authority to regulate pipelines of any kind.*" Def. Resp. to Prelim. Injunc., Doc. No. 82 at 10. That admission is fatal to Defendants' case because the Presidential Permit does regulate the Alberta Clipper pipeline.

Although the title of the permit authorizes "facilities at the international boundary between the United State and Canada," the permit itself regulates the construction, operation and

maintenance of the entire pipeline across three states. Article 13 of the permit requires the permittee to take “all appropriate measures and mitigate adverse environmental impacts,” including those in Enbridge’s 158-page “Environmental Mitigation Plan (EMP) Mitigation Plan and other mitigation and control plans found in the Final Environmental Impact Statement (FEIS) dated June 5, 2009, and the Programmatic Agreement dated August 3, 2009, both of which are appended to and made part of this permit.” Pres. Permit, Art. 13. Those plans and agreements regulate the full length of the pipeline, including but not limited to designating the right-of-way, construction methods, mitigation measures, spill responses and wildlife and habitat measures. For a list of the permit’s extensive regulations see Pl. P.I. Reply, Doc. No. 130 at 22 n.8.

In addition, the Permit specifies that it applies to the “construction, operation, and maintenance of the ‘United States facilities,’” defined as “those parts of the facilities located in the United States.” *Id.* The scope of the State Department’s action is further evident from its NEPA analysis. As the “lead federal agency,” the State Department claimed authority for the entire pipeline, including but not limited to system alternatives, route alternatives along the entire the pipeline, and the impacts of the Superior Wisconsin Terminal Expansion. FEIS at 1-8.

These facts all demonstrate that this Permit regulates the entire pipeline within the United States and goes far beyond the border-related activities and facilities on which Defendants base the State Department’s authority to act.

(b) The permit exceeds the limited congressional grant of authority to regulate oil pipelines.

As set forth above, Congress delegated limited authority to the Executive Branch in specific statutes respecting oil pipeline regulation. For example it delegated authority over rate-making, construction and safety to the FERC, DOT and PHMSA. *See supra* pp. 42-43. Federal

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